COMMUNICATIONS MANAGEMENT CO.

IBLA 94-613 Decided November 4, 1997

Appeal from a decision of the Area Manager, Havasu Resource Area, Bureau of Land Management, rejecting communication site right-of-way amendment application AZA-7037.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   The Bureau of Land Management properly exercised its discretion to reject an application to add additional facilities to a communication site right-of-way issued pursuant to the Act of Mar. 4, 1911, after the right-of-way had been conformed to FLPMA by post-FLPMA assignments.

2. Administrative Authority: Generally--Appeals: Jurisdiction--Rules of Practice: Appeals: Jurisdiction

   A protest to a resource management plan promulgated pursuant to the land-use planning provisions of FLPMA, 43 U.S.C. § 1712 (1994), is properly addressed to the Director, Bureau of Land Management, whose decision is final for the Department of the Interior. The Board has no jurisdiction to review such a land-use plan.

APPEARANCES: Lawrence A. McHenry, Esq., Phoenix, Arizona, for Appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Communications Management Company (Appellant) has appealed from a May 25, 1994, Decision of the Area Manager, Havasu Resource Area, Bureau of Land Management (BLM), Lake Havasu City, Arizona. The BLM Decision rejected Appellant's right-of-way application AZA-7037 because the application did not conform to the Yuma District Resource Management Plan (Yuma Plan).

The BLM issued right-of-way AZA-7037 on June 20, 1972, pursuant to the Act of March 4, 1911 (the 1911 Act), as amended, 43 U.S.C. § 961 (1976) (repealed effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2793 (1976)). The right-of-way grant issued to Appellant's predecessor-in-interest, the Parker Television Club, Inc., a nonprofit organization, Robert Turk, President, for a term of 50 years, and rental was waived because of the applicant's nonprofit status. 1/ The site is located within sec. 14, T. 9 N., R. 19 W., Gila and Salt River Meridian, on the part of Black Peak which is not within the Colorado River Indian Reservation.

On February 14, 1979, BLM approved assignment of right-of-way AZA-7037 from the Parker Television Club to Joseph E. Stevens. 2/ This 1979 assignment approval Decision noted that the right-of-way had issued pursuant to the 1911 Act, which had since been repealed: "Therefore, the applicant has requested this assignment under the authority of the Act of October 21, 1976 [FLPMA]." (Feb. 14, 1979, Decision at 1.) The right-of-way grant was amended to allow installation of additional radio equipment on the existing site and was made subject to "[a]ll applicable regulations in 43 CFR 2800 and regulations to be promulgated by the Secretary of the Interior pursuant to Public Law 94-579." (Terms and Conditions of Grant, Apr. 9, 1979 (emphasis supplied).) The BLM approved assignment from Stevens to the Parker Amateur Radio Association (PARA) on April 28, 1980. As PARA was a nonprofit organization, again no rental was to be charged.

By Decision dated April 15, 1982, BLM approved assignment of communications site AZA-7037 from PARA to the Appellant, Communications Management Company. The BLM issued this Decision only after, on April 6, 1982, it received a signed statement from Mr. Campbell, Partner, Communications Management Company, dated April 5, 1982, stating: "We hereby agree to be bound by the terms and conditions contained in the Right-Of-Way Permit A-7037 plus any additional terms and conditions and any special stipulations that the authorized officer may impose."

In August 1985, BLM issued the Yuma Plan. The preferred alternative described future BLM policy as to the communication sites on Black Peak:

1/ The Parker Chamber of Commerce first erected television translator facilities at the site in 1960 and turned them over to Mr. Turk in 1962. Mr. Turk received voluntary contributions from TV viewers in the area. In 1962, Mr. Turk was notified that the site was occupied in trespass. The trespass case was settled in 1972. (Acting State Director's letter Decision, June 15, 1972.)

2/ Mr. Stevens was President of the newly formed PARA, which was to be a nonprofit corporation. However, because PARA's Articles of Incorporation had not yet been filed and approved by the Arizona Corporation Commission, a nominal $25 annual rental was charged.

"All communication facilities on Black Peak -- one of the nine sites proposed for designation under the Preferred Alternative -- would be phased out and relocated at a suitable alternate site through negotiation with the Colorado River Indian Tribes [CRIT] and the site lessees." (Yuma Plan at 21.)

On April 1, 1994, Appellant filed its application to amend the existing right-of-way, AZA-7037, to add two 4-foot panel antennas mounted to the existing building and one 3-foot panel antenna mounted to the existing tower in order to provide cellular telephone service to the area. On May 25, 1994, BLM issued its Decision on appeal here, stating:

> We have reviewed your request, and we have determined that it does not conform to our Yuma District Resource Management Plan. According to the plan, this site "would be phased out and relocated to a suitable alternate site through negotiations with the Colorado River Indian Tribes and the site lessees." Therefore, your application is hereby rejected.

(Decision at 1.) Appellant brought this appeal. 3/

In its statements of reasons for appeal, Appellant contends that because the right-of-way was issued pursuant to the 1911 Act, BLM is without authority to impose conditions or stipulations on the grant under the Yuma Plan, which was developed pursuant to authority granted to BLM under FLPMA. Appellant asserts that the BLM Decision was arbitrary and capricious, because other communication site uses have been approved, including a police radio system for Parker, Arizona, for which BLM waived its policy in 1992. Appellant asserts that BLM did not provide its reasoning for the policy, articulated in the Yuma Plan, to phase out communication sites on Black Peak. Appellant characterizes BLM's action as giving up management control to CRIT, even though CRIT has not accomplished its role, as outlined in the Yuma Plan, of negotiating and identifying an alternate site.

Through counsel, BLM responded rejecting Appellant's arguments. In particular, BLM contends that Appellant cannot now challenge the Yuma Plan; Appellant was on notice that its Black Peak communication site would be phased out; Appellant is obliged to obtain BLM approval, pursuant to FLPMA, for any expansion of its right-of-way; and BLM exercised its discretion properly and fairly in rejecting Appellant's application.

[1] Appellant argues that the disputed BLM Decision was a partial termination of Appellant's rights under the 1911 Act and FLPMA, and the

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3/ On Aug. 26, 1994, this Board issued a temporary stay of the BLM Decision pending review. However, after review of subsequent supplementary pleadings, the Board denied Appellant's request for a stay, because Appellant had not shown sufficient justification. (Board Order of May 19, 1995.)

regulations promulgated pursuant to FLPMA do not apply to this right-of-way, invoking this Board's Decision in James Smith (On Reconsideration), 55 IBLA 390 (1981). When the 1911 Act, as amended, 43 U.S.C. § 961 (1976), was repealed, FLPMA expressly preserved existing rights-of-way. 43 U.S.C. § 1769(a) (1994). Existing rights-of-way were not terminated automatically by FLPMA, but the Secretary could substitute a right-of-way under FLPMA for a right-of-way issued under previous authority with the consent of the holder of the right-of-way. 43 U.S.C. § 1769 (1994). Pursuant to FLPMA, 43 U.S.C. § 1761 (1994), the Department of the Interior may "grant, issue, or renew" rights-of-way.

In 1980, BLM promulgated new regulations pursuant to FLPMA to govern the management of rights-of-way. 45 Fed. Reg. 44518 (July 1, 1980). In James W. Smith (On Reconsideration), supra, the Board held that these FLPMA right-of-way regulations did not apply to a right-of-way, issued pursuant to the 1911 Act, which had not been conformed to FLPMA. In response to this Board determination, BLM amended the regulations in 43 C.F.R. Part 2800 to clarify its intent that the rules found in Part 2800 were applicable to rights-of-way granted pursuant to statutes FLPMA repealed. 51 Fed. Reg. 6542 (Feb. 25, 1986). A right-of-way grant issued on or before October 21, 1976 (the date of the enactment of FLPMA), is covered by the regulations in 43 C.F.R. Part 2800, unless administration under that part "diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the statute shall apply." 43 C.F.R. § 2801.4; Tuscon Electric Power Co., 111 IBLA 69, 74 (1989).

As a preliminary matter, the Board finds that rejection of Appellant's application to expand this right-of-way does not diminish or reduce the original rights granted pursuant to the 1911 Act. The original grant encompassed a nonprofit operation for which rental was waived. Commercial service and payment of annual rental broadened the scope of the original right-of-way. The BLM Decision has not diminished the original right-of-way or the current commercial right-of-way; BLM simply denied Appellant further expansion at this site. The BLM Decision did not prohibit Appellant from continuing any present activity. Rather, BLM denied Appellant's request to conduct additional activities.

Appellant argues that this communication site right-of-way was not converted to the authority of FLPMA. However, the February 14, 1979, BLM Decision approving assignment of this communication site right-of-way from the Parker Television Club, Inc., Robert Turk, President, to Mr. Joseph E. Stevens of PARA, states: "The right-of-way permit was approved under the Act of March 4, 1911, which has since been repealed. Therefore, the applicant has requested this assignment under the authority of the Act of October 21, 1976 [FLPMA]."

Appellant's predecessors-in-interest accepted this right-of-way pursuant to FLPMA, 43 U.S.C. § 1761 (1994), and Appellant has presented

no reason why this right-of-way should not be subject to the level of management and management discretion FLPMA and its regulations allow. 43 U.S.C. § 1764(g) (1994). Appellant's application comported with those regulations. See 43 C.F.R. § 2803.6-1; 43 C.F.R. Subpart 2802.

Appellant has acknowledged BLM's discretion to impose additional terms and conditions in the statement filed with BLM on April 6, 1982, signed by Mr. Campbell, Partner, Communications Management Co., dated April 5, 1982. Mr. Campbell agreed to be bound by the terms and conditions contained in the right-of-way permit AZA-7037 plus any additional terms and conditions and any special stipulations that the authorized officer might impose. Appellant was on notice that additional expansion would be disallowed. The Yuma Plan so stated and, in a letter dated June 28, 1988, (Govt. Ex. F), BLM notified Appellant that it would limit further uses of the site, consistent with the Yuma Plan.

[2] Appellant challenges the Yuma Plan determination to phase out its communication site. Appellant argues that BLM did not explain, in its Decision or in the Yuma Plan, why this site should be phased out and relocated. The Yuma Plan did not specify how or when an alternate site would be determined. To the extent Appellant has challenged the terms of the Yuma Plan itself, such challenge is misdirected as well as tardy. A protest to a resource management plan, promulgated pursuant to the land-use planning provisions of FLPMA, 43 U.S.C. § 1712 (1994), such as the Yuma Plan, and the land-use planning determinations described therein, is properly addressed to the Director, BLM, whose decision is final for the Department of the Interior. 43 C.F.R. § 1610.5-2(b). Review of such planning determinations is outside the scope of this Board's jurisdiction, although the Board has jurisdiction to adjudicate an appeal of a BLM decision implementing a resource management plan. Joe Trow, 119 IBLA 388, 393 (1991); 43 C.F.R. § 1610.5-3(b).

Appellant also challenges the manner in which the BLM policy to phase out the site has been implemented. Appellant argues that it was arbitrary and capricious of BLM to allow one new use and not another. On December 17, 1992, BLM authorized Appellant to install at this site a radio repeater system for the Town of Parker Police Department. Although this new use appeared inconsistent with the BLM phase-out policy, BLM allowed this system in order to fulfill an emergency services need. The Board finds that this determination was within BLM's discretion. The BLM appropriately limited further expansion in the exercise of its discretion.

Appellant criticizes BLM's deference to CRIT and criticizes CRIT for not negotiating or identifying an alternate site since the Yuma Plan was approved. The BLM has not given up management control of the public lands to CRIT; instead, in a letter dated April 12, 1994, BLM invited CRIT to comment on Appellant's application. This request was reasonable, given both Appellant's need for access across CRIT reservation land and CRIT's identification of Black Peak as a spiritually significant area. However,

the record does not indicate whether CRIT responded. The record provides contradictory information regarding the position of CRIT. A letter dated June 3, 1992, from CRIT to BLM documents CRIT's desire to phase out Black Peak communication sites, as mentioned in the Yuma Plan, and CRIT's recognition of the need to find an acceptable alternative. (Govt. Ex. C.) However, CRIT has allowed communication sites on its side of Black Peak and has provided road and electrical access to this disputed site on public land. The record does not indicate to what extent Appellant has communicated with CRIT directly, and neither BLM nor Appellant made CRIT a party to this case. To the extent that Appellant wishes to inquire as to CRIT's position, Appellant is capable of inquiring of CRIT directly.

To the extent Appellant's other arguments have not been discussed in this Decision, they have been considered and dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision of the Havasu Resource Area Manager is affirmed.

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James P. Terry
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge